KAWASHO INTERNATIONAL (HONGKONG) LTD.

v.

JAYAWEALTH SDN. BHD. & ORS.

HIGH COURT BORNEO
IAN HC CHIN JC
[SUIT NO. T(22)-21 OF 1992]
27 MARCH 1992

BANKING: *Loan agreement - Illegality and prematurity - Permission of controller - Moneylenders Ordinance (Cap. 81) - Exchange Control Act 1953, ss. 4(1), (2), 9.*

CIVIL PROCEDURE: *Injunction - Mareva injunction - Principles of - Anton Piller.*

CIVIL PROCEDURE: *Affidavit - Application to adjourn in order to make an affidavit in reply.*

On 9 March 1992, the plaintiff, a Hongkong Ltd. Co. issued a writ against Jayawealth Sdn. Bhd. (1st Defendant), Aziz Abdullah Wong (2nd defendant) and Saudah Jasman (3rd Defendant) suing for US$767,217.98 being the sum of money which the 1st defendant admitted owing and agree to pay, under an agreement dated 28 June 1991 to the plaintiffs and which payment the 2nd and 3rd defendants guaranteed by virtue of a guarantee executed by them also on the same date.

On 9 March 1992, the plaintiff, a Hong Kong limited company by a summons-in-chambers applied *ex-parte* for a Mareva injunction coupled with an Anton Piller Order. The application was supported by an affidavit sworn on behalf of the plaintiff by one Yushiyuki Ikeo (Ikeo's affidavit) on 6 March 1992.

The Court on the same day heard the application *ex-parte* and granted the order which is to remain in force until 16 March 1992.

The Court sat on 16 March 1992. The 2nd defendant, who appeared in person, sought an adjournment so that he can instruct his Counsel to appear on his behalf as well as on behalf of the other defendants.

A company, Sinar Kulai Sdn. Bhd. which was served with the said order appeared as intervener and was represented by its Counsel. The company had on 10 March 1992 filed an affidavit which was sworn to on its behalf by Lon Yok Chong on 14 March 1992.

The Court then adjourned the hearing of the matter until 24 March 1992 and extended the validity of the said order until 24 March 1992.

At the hearing, the defendants prayed for the discharge of the said order or alternatively for a variation of the said order whereas the said Sinar Kulai Sdn. Bhd (the "intervener") sought a variation of the said order in the event that the said order is not dissolved and costs.

The defendants contended, *inter alia*:

i) there was suppression of truth;

ii) there is no real risk that the defendants will remove assets out of jurisdiction;

iii) Plaintiff do not have a good arguable case because the agreements which the plaintiff relies for its claim are illegal as the agreements relate to moneylending transactions which

contravened the Moneylenders Ordinance Cap. 81 or are illegal because the transactions contravened s. 4(1) and (2) of the Exchange Control Act 1953; and

iv) Plaintiff do not have a good arguable case because plaintiff's action is premature as the permission of the Controller under s. 9 of the Exchange Control Act 1950 has not been obtained for payment by the 1st defendant to the plaintiff in Hongkong of the money owing by the 1st defendant to the plaintiff.

Held:

[1] Even when read in isolation, paras. 13 and 14 of Ikeo's affidavit can in no way be construed as suggesting as the defendants contended that the 1st defendant were being evasive as to their whereabout. Even if there was failure to disclose, the Court will still exercise its discretion.

[2] Mareva injunction can be granted not only in cases where there is removal of assets out of jurisdiction but also where there is dissipation of the assets within the jurisdiction.

[3] On the question as to whether the agreement on which the money so lent to the 1st defendant are illegal, moneys so lent are to be repaid through the bank which could surely entail the bank complying with the requisites of the Exchange Control Act 1953 including the application for all necessary permission to remit the money. Thus, the answer is in the negative.

[4] On the question as to whether plaintiff's action is premature, the application for such permission would presuppose the existence of a ready sum of money to be remitted by the 1st defendant to the plaintiff. This in turn would mean that the defendant have first to pay the money owing to the plaintiff before the plaintiff can obtain the necessary permission to remit the sum outside the scheduled territory. Thus, the answer is in the negative.

[Defendants application to dissolve the Mareva injunction dismissed. Variation order granted accordingly.]

Cases referred to:

Creative Furnishing Sdn. Bhd. v. Wong Koi [1989] 1 CLJ (Rep) 22 ***(foll)***
KSM Credit & Leasing Sdn. Bhd. v. Datamaute (M) Sdn. Bhd. & Ors. [1986] CLJ (Rep) 414 ***(foll)***
Dormeuil Freres SA v. Nicolian International (Textiles) Ltd. [1988] 3 All ER 197 ***(cons)***
Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor. [1987] CLJ (Rep) 50 ***(cons)***

Legislation referred to:

Exchange Control Act 1950, s. 9
Exchange Control Act 1953, s. 4(1), (2)

JUDGMENT

Ian HC Chin JC:

I. History of Case

The plaintiffs, a Hongkong limited company, on 9 March 1992 issued a writ against Jayawealth Sdn. Bhd. (1st defendants), Aziz Abdullah Wong (2nd defendant) and Saudah Jasman (3rd defendant) suing for US$67,217.98 being the sum of money which the 1st defendant admitted owing and agreed to pay, under an agreement dated 28 June 1991, to the plaintiffs and which payment the 2nd defendant and 3rd defendant guaranteed by virtue of a guarantee executed by them also on the same date.

On 9 March 1992 the plaintiff, by a summons-in-chambers, applied *ex-parte* for a *Mareva* injunction coupled with an Anton Pillar order. The application was supported by an affidavit sworn on behalf of the plaintiffs by one Yoshiyuki Ikeo on 6 March 1992 (hereinafter referred to as IKEO's affidavit). The Court on the same day heard the application *ex- parte* and granted the order, the relevant part of which is reproduced here:

1. The 1st, 2nd and 3rd defendants whether by themselves their servants or agents or otherwise howsoever, be restrained until further order from removing any of their assets out of the jurisdiction of this Court or disposing of or charging or pledging or transferring or otherwise dealing with any of their assets so as to deplete the same below US$67,217.98 or attempting to take any steps to remove the same out of the jurisdiction until the trial of this action or until further order including and without the prejudice to generality of the foregoing and in particular:

(a) the 1st defendants' interest in the following:

Reference No. Title No.	**Temporary Occupation**	**Acres**
MNRC.114/22/103/42	P.T.86090677	10,000
MNRC.114/22/103/42	P.T.85092202	2,000
MNRC.114/22/103/42	P.T.86091775	2,000
	P.T.78090498, 80092334-2358 and 80090670-0693	4,000

(b) all monies now and/or hereafter derived from the proceeds of sales of logs, timber, timber concessions and properties sold by the 1st, 2nd and 3rd defendants.

(c) the balance of the monies held with Sinar Kulai Sdn. Bhd. due and payable to the 1st defendants.

2. The 1st defendants to themselves their servants or agents remit the monies referred to in 1 (b) hereof to the plaintiffs' advocates who shall pay the monies into Court.

3. Sinar Kulai Sdn. Bhd. remit the monies referred to in 1 (c) hereof to the plaintiffs' advocates who shall pay the monies into Court.

4. The 1st, 2nd and 3rd defendants within 14 days of the service of this order upon them make and serve on the plaintiffs' advocates an affidavit disclosing the full value of their assets whether within or without the jurisdiction of this Court, identifying with full particularity the nature of all such assets and their whereabouts and whether the nature of all such assets and their whereabouts and whether the same be held in their own name or held jointly or held by nominees or otherwise on their behalf and without prejudice to the generality of the foregoing specifying:

(i) the identity of all banks and other accounts in their sole names or jointly held or held by nominees or otherwise on their behalf and the sum standing to their credit in such accounts;

(ii) any property or other assets, money or goods owned and the whereabouts of the same and the names and addresses of all persons who have or may have possession, custody or control of any such assets, money or goods, at the date of service of this order.

The said order is to remain in force until 16 March 1992 in order that the parties affected can be heard as to its discharge, continuance or variation.

The Court sat on 16 March 1992 and the 2nd defendant appeared in person seeking an adjournment so that he can instruct Counsel to appear on his behalf as well as on behalf of the other defendants. A company called Sinar Kulai Sdn. Bhd., which was served with the said order, also appeared by its Counsel. This Sinar Kulai Sdn. Bhd. on 16 March 1992 filed an affidavit which was sworn to on its behalf by Loh Yok Chong on 14 March 1992 (hereinafter referred to as Loh's affidavit). The Court then adjourned the hearing of the matter herein until 24 March 1992 and extended the validity of the said order till 24 March 1992.

At the hearing on 24 March 1992, all parties were represented by Counsel. The 2nd defendant swore an affidavit on behalf of all the defendants on 21 March 1992 and this was served on Counsel for the plaintiffs on 23 March 1992 which prompted the Counsel for the plaintiffs to make an application to adjourn the hearing in order that an affidavit in reply may be made. The Court refused the application for an adjournment on the grounds that no oral explanation can detract from the meaning of the documents which the defendants had produced. In any event Counsel for the defendants had agreed that no adverse inference is to be drawn against the lack of an answer from the plaintiff with regards to the allegations in the said affidavit of the 2nd defendant. The Court then proceeded to hear arguments.

The defendants prayed for the discharge of the said order or alternatively for a variation of the said order whereas the said Sinar Kulai Sdn. Bhd. (hereinafter called the intervener), which the Court granted it leave to intervene, only seeks a variation of the said order in the event that the said order is not dissolved and costs.

Briefly summarized, the defendants contend;

(1) there was suppression of the truth when the plaintiffs fail to disclose to the Court the fact that the plaintiffs knew the 1st defendants can be contacted either through the facsimile machine, telephone or through the 1st defendants' two offices and the plaintiffs had instead through para. 14 and IKEO's affidavit implied that the 1st defendants had tried to avoid the plaintiffs;

(2) the fact that all the defendants have no business or assets outside the jurisdiction, the fact that the 2nd and 3rd defendants have Sabah as their only place of domicile and residence and the fact that the 2nd defendant hold or held various political or social organisation posts in Sabah militate against there being any risk that the defendants will remove assets out of the jurisdiction;

(3) The plaintiff do not have a good arguable case bacause the agreements which the plaintiffs rely for its claim are illegal as the agreements relate to money lending transactions which contravene the Money Lenders Ordinance (Cap. 81), Sabah or are illegal because the transaction contravene s. 4(1) and (2) of the Exchange Control Act 1953; and

(4) The plaintiffs do not have a good arguable case bacause the plaintiffs' action is premature as the permission of the Controller under s. 9 of the Exchange Control Act 1950, has not been obtained for payment by the 1st defendants to the plaintiffs in Hongkong of the money owing by the 1st defendants to the plaintiffs.

(These contentions will hereinafter be referred to as contention (1), (2), (3) and (4)).

The Law on Mareva Injunction

The relevant principles are succinctly stated by the Supreme Court in the case of C*reative Furnishing Sdn. Bhd. v. Wong Koi* [1989] 1 CLJ (Rep) 22 and these are:

(a) the applicant for a Mareva injunction must satisfy the Court:

(1) that he has a good arguable case;

(2) that the respondent has assets within the jurisdiction; and

(3) there is solid evidence to establish a real risk of assets being dissipated or removed before judgment;

(b) the applicant must make full and frank disclosure and every material representation must not be misleading and there must not be any suppression of facts (approving *KSM Credit & Leasing Sdn. Bhd. v. Datamaute (M) Sdn. Bhd. & Ors.* [1986] CLJ (Rep) 414).

As regards the principle of full and frank disclosure, it ought to be noted that it is said in *Dormeuil Freres SA v. Nicolian International (Textiles) Ltd*. [1988] 3 All ER 197, at p. 199 that:

> It is a basic principle, applicable to all *ex-parte* applications, that a plaintiff seeking *ex-parte* relief must make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the Court may discharge the ex-parte injunction on that ground alone. But if, in the circumstances existing when the matter comes before the Court *inter partes*, justice requires an order continuing the *ex-parte* injunction or the grant of a fresh injunction, such order can be made notwithstanding the earlier failure of the plaintiff to make full disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex-parte order obtained without due disclosure set aside; there is a discretion in the Court whether to do so or not.

III. ***The Defendants' Contentions***

A. *Contention (1)*

The defendants contend that the plaintiffs had by IKEO's affidavit, paras. 13 and 14, implied that the 1st defendants are being evasive as to its whereabout and this evasiveness was a ground, asserted by the plaintiffs at the ex-parte application, for saying a risk exist in the removal of the assets. Paragraphs 13 and 14 of IKEO's affidavit read:

> 13. Grounds for believing in the risk of removal of assets
>
> On 9 January 1992, one Mr. Peter Loong, a director of Daya Manis Sdn. Bhd. informed me that the 1st defendants were going to sell all their interests in the timber lands to a third party. Upon receiving this information, I went to Tawau on 21 January 1992 but only met Mr. Aziz Abdullah Wong on 25 January 1992. At the said meeting, several matters were discussed with Mr. Aziz Abdullah Wong confirming that he was negotiating with a buyer regarding a possible sale of the timber lands. Subsequently by letter dated 28 January 1992 (VI-1 pp. 46-47), the 1st defendants wrote to the plaintiffs confirming the meeting with me.
>
> 14. On learning that the 1st defendants were going to sell their interests in the timber lands, the plaintiffs made inquiries at the Registry of Companies in Kota Kinabalu (VI-1 pp. 48-82) which revealed that the 1st defendants were formed in 1983 with a registered address at 1869, 2nd floor, Jalan Paya, Tawau, Sabah. Further inquiries revealed that the 1st defendants do not operate from the address stated in the Registry of Companies which was in fact the premises of a beauty shop also selling cosmetic and skin care products. The inquiries also revealed that

> the 1st defendants do not appear to have filed any audited accounts. A land search dated 14 January 1992 (VI-1 pp. 83) with the exceptions stated therein disclosed that the 1st defendants do not own any property.

The defendants contended that the plaintiffs should have disclosed to the Court the fact that the plaintiffs knew that 1st defendants can be contacted either through the facsimile machine, through the telephone and through the 1st defendants' two offices.

The Court is of the opinion that even when read in isolation, paras. 13 and 14 IKEO's affidavit can in no way be construed as suggesting, as the defendants contend, that the 1st defendants were being evasive as to their whereabouts. All they do, as the plaintiffs contend and which the Court accepts, is to give a summary of the factual background of the 1st defendants all of which are not disputed to be true. If any doubt exists as to the purport of the said paras. 13 and 14 of IKEO's affidavit, this doubt can be dispelled when paras. 15 to 19 of IKEO's affidavit are considered. Paragraphs 15 to 18 of IKEO's affidavit relate all the facts which went to support the belief that a risk exist in the removal of the assets by the 1st defendants and para. 19 sums it all in this way:

> 19. The 1st defendant's failure to honour their obligations under the agreement, their sale of 10,000 acres of timber lands, their non-disclosure of the sale and their fraudulent use of M & C's documents to mislead the plaintiffs clearly show that the 1st and 2nd defendants cannot be relied upon.

The alleged evasiveness of the 1st defendants was therefore, contrary to the defendants' contention, never canvassed by the plaintiffs. Even if there was that failure to disclose the Court will still exercise its discretion (which the Court has - see *Dormeuil Freres SA v. Nicolian International (Textiles) Ltd., supra*) not to dissolve the *Mareva* injunction for the reasons appearing hereinafter.

It is not disputed that the defendants admitted owing the plaintiffs the sum of US$67,217.98 though the defendants are saying that the said sum is not recoverable because of illegalities and or because the plaintiffs' claim is premature. See contention (3) and (4) of the defendants. Loh's affidavit, which the Court can use even though it was filed subsequent to the *ex-parte* proceedings - see *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor*. [1987] CLJ (Rep) 50, disclosed that the 1st defendant had on 22 November 1991 sold its "timber land" to the intervener for a sum of RM700,000. On 28 January 1992 the 1st defendants untruthfully by a letter informed (Exh. "YI-pp 46-47, IKEO's affidavit) the plaintiffs that they" "have a potential buyer and it will be finalised soon" whereas in fact by that time not only had the 1st defendants already sold this "timber land" but had also already collected RM520,000 as part payment. Further sums totalling RM60,000 were also paid to the 1st defendants on 14 February 1992 and on 20 February 1992 leaving a balance of RM120,000 payable upon the happening of certain event. The evidence therefore clearly shows there are assets within the jurisdiction and there was and there will be dissipation of the assets of the 1st defendants and for this reason even if there was non-disclosure on the part of the plaintiffs, the Court would not dissolve the *Mareva* injunction.

B. *Contention (2)*

This contention (2) of the defendants was premised on the proposition that a *Mareva* injunction can only be granted if there is a risk that the defendants will remove assets out of the jurisdiction. This proposition Counsel for the defendants, after an adjournment, properly conceded is against the weight of the numerous authorities which lays down the principle

that it is not only in cases where there is removal of asset out of the jurisdiction that the Court will grant a *Mareva* injunction but include cases where there is dissipation of the assets within the jurisdiction.

C. *Contention (3) and (4)*

These two contentions (3) and (4) can be considered together. It is not disputed by the defendants that an amount of US$67,217.98 is owing by them to the plaintiffs and this perforce entitles the Court to come to the conclusion that the plaintiffs have a good arguable case even though the defendants are saying that the amount cannot be recovered because of illegality and because the plaintiffs' claim is premature. The Court, it seems, is asked by the defendants to consider, in a roundabout way, whether the plaintiffs have a good arguable case by investigating into the merits of the defendants' contention of illegality and prematurity. It suffices for the Court to say at this stage that it is against the expressed intention, reduced into writing in the several agreements produced before the Court, that the money loaned to the 1st defendants by the plaintiffs are for the purpose of enabling the 1st defendants to produce and sell to the plaintiffs timber logs that the defendants argued that these agreements are for money lending pure and simple - that it seems is arguable. That moneys so lent to the 1st defendants are to be repaid through the bank would surely entail the bank complying with the requisites of the Exchange Control Act 1953, including the application for all necessary permission to remit the money to the plaintiffs - this appears to be the answer to the alleged illegality. The application for such permission would presuppose the existence of a ready sum of money to be remitted by the 1st defendants to the plaintiffs and this in turn would mean that the defendants have first to pay the money owing to the plaintiffs before the plaintiffs can obtain the necessary permission to remit the sum outside the schedule territory. This again would appear to answer the contention of prematurity. Therefore, the said contentions of the defendants do not make the plaintiffs' case any less a good arguable case. The plaintiffs have satisfied the conditions for a *Mareva* injunction set out in *Creative Furnishing Sdn. Bhd. Case*, cited *supra.*

For the reasons above, the defendants' application to dissolve the *Mareva* injunction granted *ex-parte* is dismissed.

IV. *Variation of Order*

The parties acknowledged that there is a need to vary the order made on 9 March 1992 and the following variations are hereby ordered:

(1) By inserting the following provisos immediately after sub-clause (c) of Clause 1 (at p. 2) of the order made on 9 March 1992:

> Provided That nothing in this order shall prevent the payment by the 1st defendants to its employee, directors and landlord their salary, fees and rental up to a maximum amount of $7,500 per month.
>
> And Provided Also that nothing in this order shall prevent the payment by the 2nd defendant and or the 3rd defendant to themselves for their living expenses and that of their children and also for the education of their children up to a maximum amount of $15,800 per month.

(2) By inserting the words "Subject to the provisos in Clause 1" immediately before the word "The" at the beginning of the sentence in Clause 2 (at p. 2) of the order made on 9 March 1992 and by changing the capital letter "T" of the said word "The" to a small letter "t"; and

(3) By replacing Clause 3 (at p. 3) of the order made on 9 March 1992 with the following new Clause 3:

3. Sinar Kulai Sdn. Bhd. remit the monies referred to in 1 (c) (as and when the monies become due and payable from Sinar Kulai Sdn. Bhd. to the 1st defendants under the agreement dated 20 November 1991) to the plaintiffs' advocates who shall pay the monies into Court.

The Court also order that the variations of the order of 9 March 1992, resulting in the said provisos in Clause 1 for the benefit of the defendants, are only to take effect after the 2nd defendant shall have sworn and filed with this Court and served on the Counsel for the plaintiffs an affidavit deposing to the necessity to provide for the various sums referred to in the said provisos and exhibiting all supporting documents. The Court further order that there be liberty to apply.

As regards Clause 4 (at p. 3) of the order made on 9 March 1992 which the Court had on 24 March 1992 postponed indefinitely its operation, the Court hereby order that all the defendants are to comply with Clause 4 (at p. 3) of the order made on 9 March 1992 on or before 15 April 1992.

V. *Costs*

There remains the questions of costs. As between the plaintiffs and the defendants, the question is reserved for argument at a future date. As for the cost and expenses of the intervener, the Court orders the plaintiffs to forthwith pay the same to the intervener such same as the plaintiff and the intervener may agree, failing which the costs and expenses shall be taxed on an indemnity basis.

Also found at [1992] 2 CLJ 1213